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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Document submitted by the French delegation

Summary:	Examination of the international compensation regime established under the Conventions and proposals for its improvement.
Action to be taken:	Note the proposals to be included in the Working Group's list of issues worthy of further consideration.

The regime established under the 1969 and 1971 Conventions led to a considerable improvement in the treatment of oil pollution victims. France therefore remains very anxious to see it continue.

However, as the French delegation suggested in the document submitted to the 4th extraordinary session of the Assembly (92FUND/A/ES.4/6), it seems important to re-examine periodically the regime amended in 1992 on the basis of the protocols negotiated in 1984 to ensure that it continues to provide a level of protection for victims that lives up to the expectations of Member States.

The recent experience of the *Erika* incident led the French Government to submit to the Director a brief document suggesting three points where the regime could be improved. However, other points which were not included in that memorandum might be examined by this Working Group.

In submitting this document, which does not purport to be exhaustive, the objective of the French delegation is to draw up a list of points, without at this stage exploring them further, in order to collect the views of all the Member States.

1 Increase of the maximum compensation amounts under the two Conventions

Looking beyond the revisions contained in the 1992 Protocols, it appears that in certain circumstances the international regime may be unable to compensate victims rapidly and fully for the damage suffered.

A significant increase in the maximum amount payable by the shipowner and his insurer and in the maximum additional amount available under the Fund Convention would serve to remedy this inability in the majority of cases. France considers that the ceiling should in future be 1 000 million Euros.

In the first place, an increase of this scale could be based on the relevant P & I Club Rules concerning oil pollution damage cover and would allow cover similar to that provided by the regime existing in the United States.

In addition, this increase should be accompanied by a refinement to correct certain effects of the present regime. The experience of various incidents (*Nakhodka*, *Erika*...) has shown that some operators incur a greater risk by using old, poorly-maintained ships for low-value products which are particularly persistent. This raises the issue as to whether a mechanism should be introduced into the Conventions to allow the creation of a quality factor.

The present regime relies on two groups of operators who have different obligations:

- Firstly, shipowners, who are required to pay compensation to victims of incidents calculated solely on the tonnage of their ship, regardless of the nature of the product transported.
- Secondly, the receivers of the cargo, who are required to pay contributions calculated solely on the basis of the tonnage imported, regardless of the quality of the ships which unload the products.

Ways should be sought of combining these two elements. Two options for achieving this can be envisaged:

- Targeting the obligations of the receivers of the cargo, ie by including a weighting related to the quality of the ships discharging at their terminals.
- Targeting the maximum amount payable by the shipowner, which could be increased in relation to the characteristics of the product transported. An increase of this kind borne by the shipowner would be an incentive in respect of the quality of ships used to transport products likely to cause serious pollution, although it should not diminish the liability of the receivers, in order to guarantee better compensation for victims.

2 Improvement of the compensation for damage suffered

2.1 Priority to compensation of financially vulnerable victims (emergency payments)

The current terms of the Conventions do not allow for the possibility of treating victims differently. In the light of various cases, however, it appears that some particularly vulnerable victims are more severely affected than others by delays in the compensation procedure. Consideration should perhaps be

given to creating a permanent emergency advance account in the general budget. The amounts of such advances would be deducted from the final compensation paid to the recipients.

2.2 Take more into account compensation for damage to the environment

Compensation for damage caused to the environment has been the subject of much debate. The 1992 Protocols enshrined the principle of compensation for this type of damage provided it related to reasonable reinstatement measures. However, this approach is now being criticised, and in response to public expectations, there is a trend in some national legislations to require more than mere reinstatement measures. In some cases, compensatory measures may be requested. In the face of public expectations ever more sensitive to the preservation of their environment, the attitude to the question of compensation for environmental damage, which is also being raised in other fora (Antarctic, United Nations Informal Consultative Process on Oceans...), should be re-examined in the IOPC Fund framework.

3 Review of the conditions for invoking the liability of the shipowner and the persons listed in Article III.4 of the Civil Liability Convention

The regime established by the 1969 and 1971 international Conventions struck a balance between the principle of strict liability, the channelling of that liability on the shipowner and the recognition of the latter's right to limit his liability. Apart from the owner's employees and agents, the Conventions offered no particular protection to other parties, which allowed victims to seek to establish their liability on a basis other than that of the Conventions.

The new Civil Liability Convention breaks that balance. On the one hand, it extends the list of persons who are protected from any recourse, except in the case of wilful misconduct, and on the other, it makes it more difficult to prove their responsibility for causing the incident by requiring evidence of wilful misconduct... The latter requirement also has a bearing on the extent of the insurer's obligations (cf infra).

4 Clarification of the definition of the term 'ship'

The work of the 2nd intersessional Working Group showed that there were divergent interpretations among the delegations of the definition of 'ship' and that these divergences could affect the existence of insurance cover.

5 Clarification of the role of national jurisdictions

- The future revision should take account of the results of the current deliberations on the link between the Fund's compensation mechanisms and the jurisprudence of the Executive Committee concerning liability, and the role of national jurisdictions.

- The addition of a rule providing for mediation before commencing legal action could be a way of avoiding litigation and reducing delays in the processing of claims.